The appeal is therefore allowed and there will be an order directing the defendant company to return the deposit of $10,000 to the plaintiffs immediately with interest at 6% from the date of the judgment of the court below to the date of recovery. The defendant company will pay the plaintiffs' costs here and in the court below. The plaintiffs' deposit of $500 will be returned to them.

Gill F.J.: I have had the benefit of reading the judgment of the Lord President and am in full agreement with it.

It was clear from the evidence that the respondents, when they wrote their letter of 20th August, 1964 to the deceased to say that they would sell the property to other purchasers on their list if she failed to sign the agreement within seven days, had no intention to forfeit the deposit. By her letter of 15th September, 1964 the deceased requested the respondents to sell the property to other purchasers and to return her deposit. For three months after that letter the respondents said nothing about their right to forfeit the deposit, and then for the first time threatened forfeiture as an afterthought. In the circumstances, there was the clearest possible evidence of their having dispensed with or wholly remitted the performance of the promise made to them by the deceased, so that they were not entitled to forfeit the deposit.

I therefore agree with the Lord President that this appeal be allowed with costs to appellants here and in the court below, that there be an order directing the respondents to return the deposit of $10,000 to the appellants forthwith together with interest thereon at 6% per annum from 25th October, 1968 to date of payment, and that the appellants' deposit of $500 be returned to them.

Lee Hun Hoe J.: I have the advantage of reading the judgment of the Lord President and Gill F.J. I agree with their judgments.

It is a pity we are procluded from dealing with the interesting question whether there is in existence a binding contract or not as the matter was not raised in the court below. Although there are five grounds of appeal the most important one concerns the construction of the letter dated 20th August, 1964, upon which would depend the outcome of the appeal.

By that letter the respondent company clearly wanted to impress upon the deceased that if within seven days she did not take certain steps then they would sell to other purchasers on their waiting list. They could have strictly enforced clause 3 of the agreement but they had waived time as being the essence of the contract. The deceased was perfectly right to ask them to sell to other purchasers on their waiting list and refund her the deposit. It was not until about three months later that they threatened deceased for the first time with forfeiture. The director of the respondent company stated that if there had been a purchaser for the property when deceased requested them to sell they would have refunded the deposit. The letter of 20th August was clear and definite as to other purchasers on their waiting list. The deceased had rightly taken advantage of the offer in order to get out of the agreement. In my view the respondent company dispensed with the performance of the agreement by the deceased.

I agree that the appeal be allowed with costs here and below to the appellants and that there be an order directing the respondent company to return the deposit of $10,000 to the appellants forthwith and that the deposit of $500 be returned to the appellants.

Appeal allowed.

Solicitors: *Richard Talalla & Co.; Chooi & Co.*

CALTEX OIL MALAYSIA LTD. v. TEE THAN SONG

[O.C.J. (Raja Azlan Shah J.) May 26, 1969]
[Kuala Lumpur — Civil Suit No. 373 of 1969]

Practice and Procedure — Injunction — Application for interlocutory injunction — Licence to carry on service station — Cancellation of licence.

The plaintiffs applied for interlocutory injunction to restrain the defendant, his servants, agents and any person holding through or under him from remaining on or upon the service station of the plaintiffs and from removing any or all of the equipment on the said premises. The plaintiffs were the owners of the premises and had given a licence to the defendants to carry on the retail sale of the plaintiffs' products at the service station on the condition that the licence may be terminated by either party on giving to the other party thirty days previous notice in writing. The plaintiff by notice in writing cancelled the licence. The defendant received the said notice but refused to comply with the terms. The plaintiffs claimed that they have suffered irreparable damage in that they have been deprived of the use of the said premises and service station and they will continue to suffer damage both financially and in reputation. The defendant alleged the plaintiffs will not suffer irreparable damage and gave reasons for his allegations.

Held: as irreparable damage both in terms of money and reputation would be occasioned to the plaintiffs if the defendant were allowed to remain on the premises, the interlocutory injunction would be granted.

Case referred to:—

(1) *Kesho Prasad Singh* v. *Srinibash Prasad Singh* (1911), I.L.R. 38 Cal. 791, 794.

CIVIL SUIT.

Harry Elias for the plaintiffs.

D.P. Vijandran for the defendant.

Cur. Adv. Vult.

Raja Azlan Shah J.: This is an applicaton for an interlocutory injunction, until trial, restraining the defendant, his servants, agents and any person holding through or under him from remaining on or upon the service station of the plaintiffs and from removing any or all of the equipment on the said premises.

The circumstances giving rise to this application are as follows: The plaintiffs are dealers in petroleum products. They have erected a service station known as Caltex Cheras Road, Kuala Lumpur Service Station on a piece of land on Cheras Road. They are the registered lessees. In August 1963 the defendant entered into an agreement with the plaintiffs i.e., the Memorandum of Service Station Dealer and Licensing Agreement, hereinafter referred to as the "licensing agreement." In November 1963 he entered into another agreement with the plaintiffs i.e., the Memorandum of Equipment and Service Agreement, hereinafter referred to as the "equipment agreement." The defendant is described in both the agreements as carrying on business in sole proprietorship under the firm name and style of Thean Lee. By the terms of the licensing agreement the defendant was granted a license as vendor of the plaintiffs' products, to enter upon and to use the said premises for the sole purpose of carrying on the retail sale of the plaintiffs' products at the service station.

The said agreement stipulates that the premises were to remain at all times the absolute property and in the sole possession of the plaintiffs. (clause 1).

Clause 16 is important and is reproduced in extenso:—

"This agreement may be terminated by either party on giving to the other party thirty (30) days previous notice in writing to that effect and upon the expiration of such notice the agreement shall stand terminated, but without prejudice to the rights of either party against the other in respect of any matter or thing antecedent to such termination. On receipt of notice of termination by either the company or the dealer, the dealer shall leave the premises within thirty (30) days from the date of receipt of the said notice by either party in as good a condition as they were when entrusted to his care, ordinary wear and tear excepted."

By the terms of the equipment agreement the plaintiffs at the defendant's request loaned to him certain machinery and motor vehicle services equipment to assist him in operating the service station at the said premises. The equipments were set out in a schedule.

Clause 3(1) of the equipment agreement stipulates:—

"This agreement may be terminated by the company at any time giving to the licensees not less than thirty (30) days' previous notice in writing and shall determine *ipso facto* upon the death of the operators or any of them."

Pursuant to clause 16 of the licensing agreement and clause 3(1) of the equipment agreement the plaintiffs by a notice in writing dated 25th September, 1968 terminated the agreements with effect from 31st October, 1968. The defendant received the said notice but refused to comply with the terms. The plaintiffs gave a second notice of termination dated 28th December, 1968 to take effect from 31st January, 1969. The defendant failed to comply with the second notice. It is alleged that as a result of the failure or refusal of the defendant to vacate the premises, the plaintiffs have suffered loss in that they have been deprived of the use of the said premises and service station and that they will continue to suffer irreparable damage both financially and in reputation.

In a specially indorsed writ the plaintiffs claimed for an interlocutory injunction as described above, an order for vacant possession and delivery of all equipments mentioned in the equipment agreement and damages.

It is established law that a court upon an application for an interlocutory injunction in support of a legal right will deal with the injunction upon the affidavits and documents verified thereby and will confine itself directly with the immediate object sought, in order to leave the ultimate question between the parties to be decided on evidence adduced at the trial.

The plaintiffs in their supporting affidavit referred to the averments in their specially indorsed writ and statement of claim and added in paragraph 12 to the effect that if this court refuses to grant the plaintiffs the injunction, they will suffer irreparable damage both financially and in reputation since they have stopped supplying the defendant with petroleum products and it therefore follows that whatever sales that are affected by the defendant or are being effected by him will not be from their supply.

In the affidavit in reply the defendant mainly refers to the circumstances in which he executed the agreements with the plaintiffs. He alleges that the agreements were made under circumstances as to give the plaintiffs an unfair advantage over him. He says that the notice is bad in that there is absence of reasonable notice. He further says that the 30 days notice had caused acute hardship to him and that clause 3(1) of the equipment agreement is unilateral in that only the plaintiffs are empowered to give the 30 days notice.

These contentions are in my opinion connected with the merits of the case which have to be determined at the trial. The only relevant averments in the affidavit are those contained

in paragraphs 15 and 16. In essence he deposed that the plaintiffs will not suffer irreparable damage because by the plaintiffs' actions in stopping their supply of petroleum products to him, he had been compelled to buy Caltex petroleum products from other dealers at a premium in order to continue his supply to his customers at the usual rates, thus losing profit. He further undertakes to sell only Caltex petroleum products to assuage any real or apparent fear of the plaintiffs.

Therefore the position is this. The defendant does not dispute the plaintiffs' legal title. He is in physical possession of the plaintiffs' service station, premises and equipment. The supply of petroleum products from the plaintiffs have been stopped by the latter. In order to continue with the supply of Caltex petroleum products to his clients he deposed that he had to buy them from other retailers at a high premium thus selling them at a loss. His affidavit does not disclose either the name or names of the alleged retailers or the amount of petrol products purchased. On the other hand the plaintiffs want him to vacate the premises and the service station so as to restrain him from buying Caltex petroleum products from other retailers. There is no guarantee in spite of the defendant's undertaking not to sell petroleum products other than Caltex that such sales effected or to be effected are from the plaintiffs' supply. That is the mischief complained of. It may well be that that is not only a breach of the licensing agreement to buy Caltex petroleum products from the plaintiffs but the retailers might also be in breach of the agreement to sell the plaintiffs' products to the defendant in bulk.

In my opinion the plaintiffs' inconvenience exceeds that of the defendant. To allow the defendant to stay would be otiose because his supply had been stopped by the plaintiffs. To allow him to purchase Caltex petroleum products from other retailers would not only cause him inconvenience and hardship but would entail considerable loss. The only course for him to do, as I see it, is to await the final outcome of the trial. The plaintiffs have given an undertaking in damages, if any, if it is proved at the trial that the injunction was wrongly granted. On the other hand irreparable damage both in terms of money and reputation would be occasioned to the plaintiffs by refusing the injunction than is likely to be caused to the defendant if the injunction is granted. I may usefully refer to a well-known passage in *Kesho Prasad Singh* v. *Srinibash Prasad Singh* (1) which in my opinion is of great assistance to our present case.

"It is well settled that, as a general rule where the plaintiff is out of possession and claims possession, the court will refuse to interfere by grant of injunction against the defendant in possession under a claim of right; but where the threatened injury would be irreparable, an injunction will be granted at the instance of a complainant out of possession. . . ."

It cannot be said that by granting the injunction the action is completely disposed of since the plaintiffs by their statement of claim are also claiming damages.

The submission of counsel on the provisions of section 54(f) and (i) of the Specific Relief (Malay States) Ordinance, 1950 cannot be accepted. That section specifies the defences that may be set up in a suit for a perpetual injunction. Such is not the case before us. Likewise section 21 of the said Ordinance is not applicable for the present case does not involve the consideration of specific performance.

Injunction granted.

Solicitors: *Shearn, Delamore & Co.; Athi Nahappan & Co.*

YAH BINTI AJI v. FATIMAH BINTI HAJI MOHAMED ARIFFIN & ORS.

[O.C.J. (Chang Min Tat J.) May 27, 1969]
[Ipoh — Civil Suit No. 77 of 1964]

Practice and Procedure — Application to call further evidence after close of case for defendants — Principles applicable.

Evidence — Fresh evidence — Principle applicable.

After the close of the case for the defendants, application was made to call further evidence for the defence. Counsel for the defendants said that he had unearthed certain evidence which was not only material to the claim but would perhaps be decisive.

Held: the defendant had not shown that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial and therefore the application must be dismissed.

Cases referred to:—

(1) *Re Chennell* (1877), 8 Ch. D. 492 at p. 506.

(2) *Ladd* v. *Marshall* [1954] 1 W.L.R. 1489.

CIVIL SUIT.

C.C. Goh for the plaintiff.

M. Sivalingam for the defendants.

Chang Min Tat J.: After the close of the case for the defendants and not before (so that it was not a matter of calling rebutting evidence) counsel for the defendants applied to call further evidence. He said he had unearthed certain evidence which was not only material to the claim but would perhaps be decisive.

Counsel for the plaintiff, not unnaturally, perhaps, opposed the application. He did not think it fair that the other side should have two bites of the apple but otherwise produced no authority in support of his opposition.